No. 83-2136

# In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF CONNECTICUT, DEPARTMENT OF INCOME MAINTENANCE, PETITIONER

*v.*

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether only a traditional mental hospital can be classified as an "institution for mental diseases" (IMD) under the Medicaid statute, so that the Secretary of Health and Human Services is barred from designating an "intermediate care facility" as an IMD for purposes of applying the statutory exclusion of Medicaid coverage for services to persons in an IMD.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 731 F.2d 1052. The opinion of the district court (Pet. App. 1c-25c) is reported at 557 F. Supp. 1077.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 1b-2b) was entered on March 30, 1984. The petition for a writ of certiorari was filed on June 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

1. Section 1905(a) of the Social Security Act, as amended, 42 U.S.C. (& Supp. V) 1396d(a), provides in pertinent part:

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services * * * —

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

* * * * *

(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older; * * *

* * * * *

(14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;

(15) intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals who are determined * * * to be in need of such care;

* * * * *

(18) * * * except as otherwise provided in paragraph (16), such term does not include * * * (B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

2. Section 1905(c) of the Act, as amended, 42 U.S.C. (Supp. V) 1396d(c), provides in pertinent part:

(c) For purposes of this subchapter the term "intermediate care facility" means an institution which (1) is licensed under State law to provide, on a regular basis, health-related care and services to individuals who do



not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities * * *. The term "intermediate care facility" also includes any skilled nursing facility or hospital which meets the requirements of the proceeding [*sic*] sentence. * * * With respect to services furnished to individuals under age 65, the term "intermediate care facility" shall not include, except as provided in subsection (d) of this section, any public institution or distinct part thereof for mental diseases or mental defects.

**STATEMENT**

1. The Medicaid program was established pursuant to Title XIX of the Social Security Act, 42 U.S.C. (& Supp. V) 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). To participate in the program, a state must develop a Medicaid plan that is consistent with the requirements of Title XIX and federal regulations. 42 U.S.C. (& Supp. V) 1396a. See *Schweiker* v. *Panthers*, 453 U.S. 34, 35 (1981). Following approval of the plan by the Secretary of Health and Human Services, the state is entitled to federal financial assistance for providing medical care to eligible individuals who are covered by the state plan. 42 U.S.C. (& Supp. V) 1396(a).

The Medicaid statute specifically excludes from coverage services provided to any person more than 21 and under 65 years of age who is a patient in an "institution for mental diseases" (IMD). 42 U.S.C. (& Supp. V) 1396d(a). The statute defines "medical assistance" for which federal financial participation is available to include inpatient hospital

services, skilled nursing facility services and intermediate care facility (ICF) services, other than services provided in an institution for mental diseases. 42 U.S.C. 1396d(a)(1), (4)(A) and (15). Payments for services to individuals under age 65 who are patients in an institution for mental diseases (other than inpatient psychiatric care for persons under age 21) are further specifically prohibited by 42 U.S.C. (Supp. V) 1396d(a)(18)(B).

The Medicaid statute does not define the term "institution for mental diseases." The Secretary, however, has defined an IMD as

> an institution that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases, including medical attention, nursing care and related services. Whether an institution is an institution for mental diseases is determined by its overall character as that of a facility established and maintained primarily for the care and treatment of individuals with mental diseases, whether or not it is licensed as such.

42 C.F.R. 435.1009(e)(2). The Secretary has supplemented this definition with a series of field staff instructions that describe the relevant criteria to be considered in determining whether or not the overall character of a facility is that of an IMD.[1]

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[1]These criteria instruct audit teams to focus on the following characteristics of the institution under review (Pet. App. 5a n.2):

1. Licensed as a mental institution.
2. Advertised as a mental institution.
3. More than 50% of the patients have a disability in mental functioning.
4. Used by mental hospitals for alternative care.



2. The State of Connecticut brought this action in the United States District Court for the District of Connecticut, seeking review of a decision by the Department of Health and Human Services (HHS) disallowing federal financial assistance claimed by Connecticut under the Medicaid program for services provided to persons in Middletown Haven Rest Home, a private long-term care facility. The facility had been certified by the State as an ICF during the fiscal quarters at issue here, from January 1977 through September 1979. The State received federal financial assistance for payments it made to the institution during those quarters.

a. The certification of Middletown Haven as an ICF came under scrutiny in December 1979, when an audit team from HHS undertook a study of its patient records (Pet. App. 4a-5a). The study was conducted as part of an investigation by HHS to determine whether certain states, including Connecticut, "were discharging patients from mental hospitals and arranging their placement in ICF's in order to circumvent the Medicaid exclusion for patients under 65 in IMD's" (*id.* at 5a). Applying the criteria developed by HHS to supplement the IMD definition in its regulations (see note 1, *supra*), the audit team determined that Middletown

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5. Patients who may have entered mental hospitals are accepted directly from the community.
6. Proximity to State mental institutions (within a 25 mile radius).
7. Age distribution uncharacteristic of nursing home patients.
8. Basis of Medicaid eligibility for patients under 65 is due to mental disability.
9. Hires staff specialized in the care of the mentally ill.
10. Independent professional reviews conducted by state teams report a preponderance of mental illness among patients in the facility.

Haven was an IMD on the basis of the following facts (Pet. App. 5a; Administrative Record, Tab 23, at 18, 36-37):

1. Seventy-seven percent of the patients had a major mental illness that was a substantial part of their need for ongoing care.
2. More than 50% of the patients had been admitted directly from state mental hospitals.
3. The facility is located only three miles from a state mental hospital and was used as an alternative placement for the hospital.
4. Sixty-four percent of the population was between the ages of 22 and 64, in contrast to the average age of 82 in the general nursing home population.
5. The facility's license from the State contained a "psychiatric rider" authorizing it to "care for persons with certain psychiatric conditions."
6. The facility advertised itself to the community and to potential sources of referral as a facility specializing in mental diseases.
7. The facility hired professional staff, including three psychiatrists, who specialized in the care of the mentally ill.

After reviewing the report of the audit team, the Health Care Financing Administration disallowed the reimbursement claimed by Connecticut for the cost of services provided to patients at Middletown Haven.

b. Connecticut appealed the disallowance to the HHS Departmental Grant Appeals Board pursuant to 45 C.F.R. Pt. 16. The Connecticut appeal was consolidated with the



appeals of three other states (Minnesota, Illinois and California) seeking review of findings that certain facilities in those states were IMDs. The Board upheld all of the disallowances, finding substantial evidence in the record that the "overall character" of each of the facilities was such that it met the regulatory definition of an IMD (Pet. App. 1d-61d). The Board's decision constituted the final agency decision.

c. Connecticut sought judicial review of the Secretary's decision in the district court. The district court granted Connecticut's motion for summary judgment (Pet. App. 1c-25c). It held that the IMD exclusion in the Medicaid statute "excludes only care in mental hospitals, meaning care in facilities which, at the least, provide total care to mental patients" (*id.* at 25c).

The court of appeals reversed (Pet. App. 1a-16a). Relying on the language and legislative history of the IMD exclusion, the court rejected petitioner's contention that "the IMD exclusion was intended to foreclose federal financial assistance only for services provided in traditional state mental hospitals" (*id.* at 7a). Instead, the court concluded that Congress intended the IMD exclusion "to block the use of Medicaid funds to help pay for the care of the mentally ill under age 65 in a broad range of institutions subsumed under the label 'institutions for mental diseases,' including ICF's" (*id.* at 15a). Consequently, the court held that "the IMD definition adopted by HHS and supplemented by its internal criteria reasonably implements Congress' intent" (*ibid.*).

## ARGUMENT

Petitioner contends — as it did in the court of appeals — that IMDs and ICFs "are mutually exclusive categories of institutions" (Pet. App. 7a) and that the IMD exclusion in the Medicaid statute was meant to apply only to traditional mental hospitals, not to facilities like ICFs that offer

a lower level of care. The court of appeals, in a thorough opinion on which we rely, correctly rejected this argument. Moreover, contrary to petitioner's assertion (Pet. 7-11), the holding below that an ICF can be classified as an IMD does not conflict with this Court's decision in *Schweiker* v. *Wilson,* 450 U.S. 221 (1981), or with the decision of the Eighth Circuit in *Minnesota* v. *Heckler,* 718 F.2d 852 (1983). Accordingly, review by this Court is not warranted.

1. It is well settled that an agency's construction of a statute it administers is entitled to considerable deference. A reviewing court need not conclude that the agency's construction is the only permissible one, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. Rather, so long as the agency's interpretation of the statute is a reasonable one, the court may not substitute its own construction for that of the agency. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* No. 82-1005 (June 25, 1984), slip op. 4-7. Here, the court of appeals correctly concluded that "the IMD definition adopted by HHS and supplemented by its internal criteria reasonably implements Congress' intent" (Pet. App. 15a).

Although the Medicaid statute does not define the term "institution for mental diseases," the statutory language supports the Secretary's position that IMDs and ICFs are not mutually exclusive. In defining the categories of medical assistance for which Medicaid reimbursement is available, the statute lists separately "inpatient hospital services," "skilled nursing facility services," and "intermediate care facility services," and contains a separate and unequivocal exclusion from *each* type of service for individuals in IMDs. See 42 U.S.C. 1396d(a)(1), 4(A) and (15). As the court of appeals observed (Pet. App. 10a), "these identical exclusions strongly imply that Congress contemplated that any



of the three types of facilities — the hospital, the skilled nursing facility and the ICF — might qualify under certain circumstances as an IMD." In addition, the court of appeals pointed out (*ibid.*) that

> the definition of an ICF states that "the term 'intermediate care facility' shall not include . . . any public institution . . . for mental diseases or mental defects," 42 U.S.C. § 1396d(c), except for public ICFs "for the mentally retarded or persons with related conditions," *id.* § 1396d(d). Since the exclusion for IMD's does not distinguish between public and private facilities, the combination of Sections 1396d(a)(15), 1396d(c) and 1396d(d) makes sense only as a statement that ICF's which are IMD's are excluded from the definition except those public ICF/IMD's which care for the mentally retarded. In short, the provisions are meaningless unless some ICF's are IMD's and thus subject to the statutory exclusion.

Moreover, after an exhaustive review of the legislative history (Pet. App. 10a-15a), the court of appeals correctly concluded (*id.* at 15a) that Congress intended the IMD exclusion "to block the use of Medicaid funds to help pay for the care of the mentally ill under age 65 in a broad range of institutions subsumed under the label 'institution for mental diseases,' including ICF's. Congress was asked repeatedly to lift this exclusion in whole or in part and refused" (*ibid.*). Thus, the language and history of the statute show that the Secretary's reasonable interpretation of the term "institution for mental diseases" is fully consistent with congressional intent.

2. The decision of the court of appeals does not conflict with the decisions of this Court in *Schweiker* v. *Wilson, supra,* or of the Eighth Circuit in *Minnesota* v. *Heckler, supra,* on the question whether an ICF can be classified as

an IMD for purposes of applying the Medicaid statute's IMD exclusion.

In *Schweiker* v. *Wilson, supra,* the Court did not rule that IMDs and ICFs were mutually exclusive categories of institutions. Indeed, the Court did not even address the issue of the definition of the term "institution for mental diseases." Instead, the Court addressed the constitutionality, under equal protection principles, of a statute excluding from Supplemental Security Income benefits those residents of public mental institutions who are subject to the IMD exclusion. Petitioner therefore errs in relying (Pet. 10) on references in both the majority and dissenting opinions in *Wilson* to selected portions of the legislative history of the IMD exclusion, because that history merely confirms that a state mental hospital is an IMD — a fact clearly not at issue here and certainly not inconsistent with the notion that an ICF also can be classified as an IMD.

Similarly, in *Minnesota* v. *Heckler, supra,* the court did not hold that an ICF cannot qualify as an IMD. On the contrary, the Eighth Circuit specifically stated that IMD treatment may include the type of care provided by facilities that offer only ICF services — *i.e.,* " 'room and board' care which is not aimed at simultaneously providing active or therapeutic treatment leading to cure" (718 F.2d at 866; Pet. App. 23e).

To be sure, as petitioner points out (Pet. 8), the decisions of the courts of appeals in this case and in *Minnesota* v. *Heckler, supra,* differ to some extent concerning the criteria that the Secretary may use to determine whether an institution (including an ICF) warrants treatment as an IMD. The court below stated that "the IMD exclusion virtually compels HHS to focus on the nature of the illnesses treated rather than the care furnished" (Pet. App. 16a), whereas the Eighth Circuit stated that "the characterization of an IMD



must fundamentally center on the type of care or nature of services required, not on the mere presence in a facility of patients who have, or at one time did have, diagnoses of a mental disease" (718 F.2d at 863; Pet. App. 17e).

We believe that any issue arising from this difference in approach is not subsumed within the question presented by the petition and, in any event, is not of sufficient importance to warrant review by this Court. This is so because, as a practical matter, the Eighth Circuit's focus on "care and treatment" does not constitute a significant departure from the Second Circuit's focus on diagnoses. In most, if not all, cases (including this one), ICFs that qualify as IMDs under the Second Circuit's approach because they contain large numbers of patients who suffer from mental diseases will also be found to be IMDs because extensive mental health care and treatment would be required in such facilities. As the Eighth Circuit observed (718 F.2d at 866 n.27; Pet. App. 23e n.27 (emphasis in original)), "[t]he degree of care and treatment *required* by a patient's mental or physical condition should be equivalent to the degree of care and treatment *furnished* to the patient by a facility."[2] Indeed, the Secretary did not seek certiorari in *Minnesota* v. *Heckler, supra,* in large part because the Eighth Circuit's requirement of focusing on care and treatment was considered to be substantially consistent with the Secretary's regulation and supplemental criteria.[3]

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[2]In this case, for example, the record clearly demonstrates that the facility at issue would qualify as an IMD under the Eighth Circuit's test because of the type of care provided to the patients. See page 6, *supra.*

[3]The Secretary's regulation defines an IMD as "an institution *that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases.*" 42 C.F.R. 435.1009(e)(2) (emphasis added). Most of the ten criteria that the Secretary uses to supplement her regulation in making the determination whether the overall character of an institution warrants treatment as an IMD do not focus on diagnoses. See Pet. App. 5a n.2.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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